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9 UNITED STATES DISTRICT  
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 JONATHON WESLEY BISHOP,

15 Defendant.

Case No.: 2:20-CR-00051-WFN-1

United States' Sentencing  
Memorandum

16  
17 Plaintiff, United States of America, by and through Vanessa R. Waldref,  
18 United States Attorney for the Eastern District of Washington, and Ann T. Wick,  
19 Assistant United States Attorney for the Eastern District of Washington, submits this  
20 memorandum setting forth the government's position at sentencing. The  
21 government recommends that the Court sentence the defendant to a term of  
22 imprisonment of 78 months, followed by an eight-year term of supervised release.  
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## **INTRODUCTION**

Defendant pleaded guilty to receipt of child pornography, whereby the government limited its recommendation to a within-guideline recommendation. ECF No. 61 at 7. Statute requires a prison sentence of 5-20 years, followed by at least a five-year term of supervised release. The Court may also impose up to a \$250,000 fine, in addition to special assessments under 18 U.S.C. §§ 2259A, 3013, and 3014(a)(4). PSR ¶¶ 78-80.

The United States agrees with the procedural history and offense conduct detailed in paragraphs one through 16 of the initial Presentence Investigation Report (hereinafter “PSR”). ECF No. 68. Neither party filed objections to the PSR.

## **LEGAL ANALYSIS**

The Ninth Circuit has set forth a basic framework which the district courts should follow in compliance with the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005):

- (1) Courts are to begin all sentencing proceedings by correctly determining the applicable sentencing guidelines range, precisely as they would have before *Booker*.
- (2) Courts should then consider the § 3553(a) factors to decide if they support the sentence suggested by the parties. Courts may not presume that the guidelines range is reasonable. Nor should the guidelines factors be given more or less weight than any other. They are simply to be treated as one factor among the § 3553(a) factors that are to be taken into account in arriving at an appropriate sentence.

1 (3) If a court decides that a sentence outside the guidelines is warranted,  
2 then it must consider the extent of the deviation and ensure that the  
3 justification is sufficiently compelling to support the degree of the  
4 variance.

5 (4) Courts must explain the selected sentence sufficiently to permit  
6 meaningful appellate review.

7 *United States v. Carty*, 520 F.3d 984, 991-92 (9th Cir. 2008).

8 **I. United States Sentencing Guidelines Calculation**

9 “As a matter of administration and to secure nationwide consistency, the  
10 Guidelines should be the starting point and the initial benchmark.” *Gall v. United*  
11 *States*, 552 U.S. 38, 49 (2007).  
12

13  
14 A. Offense Level Calculation

15 The PSR correctly calculated the defendant’s total offense level as 34. PSR  
16 ¶ 37.  
17

18 B. Criminal History Calculation

19 The PSR calculated the defendant’s criminal history category as Category I.  
20 PSR ¶ 43. The government is reviewing whether points should be assessed for  
21 Defendant having committed child pornography crimes while a state theft case was  
22 pending. PSR ¶ 46.  
23

24 C. Advisory Guideline Range

25 Based upon a total offense level of 34 and a criminal history category of I, the  
26  
27 advisory guideline imprisonment range is 151-188. PSR ¶ 70.  
28

1           **II.   Imposition of a Sentence under 18 U.S.C. § 3553**

2                   A.    18 U.S.C. § 3553(a) factors

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4                           1.   The nature and circumstances of the offense

5           The nature and circumstances of Defendant's offense warrants a sentence of  
6  
7 78 months, followed by an eight-year term of supervised release. Defendant is not  
8 a true first-time offender, although this will be his first child pornography crime  
9 conviction. Defendant was first caught trading child pornography files after an  
10 undercover federal agent was able to download thousands of child pornography files  
11 from Defendant over a six-month time span in 2019. ECF No. 61 at 4; PSR ¶¶ 9-  
12 10. In August of that year, the FBI executed a search warrant at Defendant's home  
13 and seized Defendant's electronic devices. ECF No. 61 at 4; PSR ¶ 11. Defendant  
14 admitted to downloading child pornography mostly on an Xbox One gaming system.  
15 ECF No. 61 at 4-5; PSR ¶ 12. Agents were unable to search the Xbox, but they  
16 discovered 23 images of child pornography on Defendant's phone, which Defendant  
17 admitted to using to take pictures of what he downloaded. ECF No. 61 at 5; PSR  
18 ¶ 12.

19  
20           No less than six months later, Defendant was again online, again trading  
21 child pornography files. ECF No. 61 at 5; PSR ¶ 13. The FBI again executed a  
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1 search warrant at Defendant's home and again seized Defendant's devices.<sup>1</sup> A  
2 sentence above the mandatory minimum five years is warranted based on these facts.  
3

4 2. The history and characteristics of the defendant

5 Defendant's history and characteristics also support a 78-month sentence.  
6 First, as noted above, Defendant returned to additional child pornography crimes  
7 even after having his life disrupted by the execution of a federal search warrant at  
8 his home and his sexual interest in minors discovered. Defendant also committed  
9 another offense since then – a third degree theft, which was ultimately dismissed  
10 pursuant to a deferred prosecution agreement in state court. PSR ¶¶ 46-48.  
11  
12

13 It bears noting that at the time of the first search warrant execution in August  
14 2019, Defendant informed agents that he wanted to get help and that his meth  
15 addiction was the “stem” of his child pornography activities.<sup>2</sup> Defendant reported  
16 his last use of methamphetamine was approximately one year prior to his arrest on  
17 June 11, 2020. PSR ¶¶ 2, 59. Nevertheless, Defendant was caught sharing child  
18 pornography from February to April 2020, despite abstaining from  
19 methamphetamine supposedly since the first time he was caught in 2019.  
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27 <sup>1</sup> Defendant was indicted based on the 2019 activity, and the need to supersede with  
28 the 2020 activity was rendered moot by resolution of the case as reflected in the  
Plea Agreement. ECF Nos. 1, 61.

<sup>2</sup> FBI Serial, Bates Nos. 6 – 6.05.

- 1                   3.     The need for the sentence imposed to reflect the  
2                             seriousness of the offense, to promote respect for  
3                             the law, and to provide just punishment.

4             Crimes involving the sexual exploitation of a minor child are among the most  
5     serious and reprehensible crimes that can be committed. A sentence of 78 months,  
6     followed by an eight-year term of supervised release, recognizes this, promotes  
7     respect for the law, and is just punishment.

- 9                   4.     The need for the sentence imposed to afford  
10                            adequate deterrence and to protect the public.

11             The government's recommended sentence protects the public and serves the  
12     goal of general and specific deterrence. Defendant is in particular need of specific  
13     deterrence. After first being caught trading child pornography images online and  
14     having federal agents search his home, at which time Defendant inquired of the  
15     penalty for his crime and expressed concern over going to prison,<sup>3</sup> Defendant  
16     nevertheless returned to his criminal conduct no less than six months later. Neither  
17     the fear of prison, nor the fact that his conduct could jeopardize his visitation with  
18     his minor children, was enough to deter him from returning not only to crime, but to  
19     the very same activity for which he was previously caught.

20             The public is protected from Defendant's crimes while he is serving a  
21     custodial sentence and hopefully beyond, if he is successfully deterred from criminal  
22     

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23             <sup>3</sup> FBI Serial, Bates Nos. 6 – 6.05.

1 activity by his sentence and takes advantage of rehabilitative programs and tools  
2 offered while in custody and upon release. Such a sentence also puts other offenders  
3 on notice of the strict consequences that flow from victimizing our youth.  
4

5                   5.     The kinds of sentences available  
6

7             The Court must sentence Defendant to at least five years in prison, followed  
8 by at least a five-year term of supervised release. PSR ¶¶ 69, 71. The prison  
9 sentence may not exceed 20 years, but supervised release may be for life. PSR ¶¶ 69,  
10 71. Defendant is ineligible for probation. PSR ¶ 73.  
11

12                   6.     The established sentencing range  
13

14             Based upon a total offense level of 34 and a criminal history category of I, the  
15 adjusted advisory guideline imprisonment range is 151-188 months. PSR ¶ 70.  
16

17                   7.     The need to avoid unwarranted sentence disparities  
18

19             The government's recommended sentence does not cause any unwarranted  
20 sentencing disparities. Of note, it is typical in this District for the government to  
21 resolve cases based on the online trading of child pornography, where the offender  
22 does not have prior history of similar conduct, nor evidence of a hands-on sexual  
23 offense against a minor, with a Rule 11(c)(1)(C) plea agreement for five years of  
24 imprisonment. However, where the offender does have other offense conduct, such  
25 as here, the government adjusts its plea agreements and sentencing  
26 recommendations accordingly. A sentence greater than true first-time child  
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1 pornography offenders typically receive in this district is appropriate, just, and fair.  
2 Were the Court to sentence Defendant merely to the mandatory minimum five years,  
3 that would be the unwarranted sentencing disparity. That would be unfair to all the  
4 offenders who do not reoffend before their case is fully prosecuted, whether on  
5 pretrial release or awaiting charges.  
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8 8. The need to provide restitution to any victims of the  
9 offense

10 Although the Plea Agreement requires restitution be paid to two Series  
11 victims, that provision of the Plea Agreement is in error. The government has not  
12 received any requests for restitution in this case.  
13

14 B. Application of the Guidelines in Imposing a Sentence  
15 under 18 U.S.C. § 3553(b)  
16

17 The guidelines, formerly mandatory, now serve as one factor among several  
18 that courts must consider in determining an appropriate sentence. *Kimbrough v.*  
19 *United States*, 552 U.S. 85, 90 (2007). It remains, however, that “the Commission  
20 fills an important institutional role: It has the capacity courts lack to base its  
21 determinations on empirical data and national experience, guided by a professional  
22 staff with appropriate expertise.” *Id.* at 108-09 (internal quotation marks omitted).  
23 Thus, “the Commission’s recommendation of a sentencing range will ‘reflect a  
24 rough approximation of sentences that might achieve § 3553(a)’s objectives.” *Id.*  
25 (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007)).  
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### 1           **III.    \$5,000 Special Assessment of the JVT**

2           The United States seeks the imposition of a \$5,000 special assessment  
3  
4 pursuant to the Justice for Victims of Trafficking Act (JVT). Assessments paid  
5 under the JVT are deposited into the Domestic Trafficking Victims Fund for grants  
6  
7 to enhance programs that assist trafficking victims and provide services for victims  
8 of child pornography.

9           Under the JVT, the Court “shall assess an amount of \$5,000 on any non-  
10 indigent person or entity convicted of an offense under ... (3) chapter 110 (relating  
11 to sexual exploitation and other abuse of children).” 18 U.S.C. § 3014(a)(3). In  
12 imposing a JVT assessment, the non-indigency of a defendant is the governing  
13 deliberation and the statute does not require the court to consider the factors  
14 enumerated in 18 U.S.C. § 3572 with respect to the entry of a non-JVT fine. *See*  
15 *generally* 18 U.S.C. § 3014 (no reference to or requirement upon the court to  
16 evaluate the 18 U.S.C. § 3572 factors when imposing a JVT assessment).

17           Whether a defendant is non-indigent for the purposes of a JVT assessment  
18 is determined not by a static snapshot of a defendant’s financial condition at the time  
19 of sentencing, but instead should be based on considerations of a defendant’s current  
20 and future financial condition.

21                   [A] district court must resolve two basic questions in  
22 assessing the defendant's indigency: (1) Is the defendant  
23 impoverished now; and (2) if so, does the defendant have the  
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means to provide for himself so that he will not always be impoverished?

...

Because the defendant's obligation to pay persists for at least twenty years after his sentencing, it would make little sense for the district court to consider only the defendant's financial condition at the time of sentencing. That snapshot in time may not accurately represent the defendant's condition five, ten, or twenty years after sentencing. Rather, the defendant's employment prospects and earnings potential are probative of his ability to pay the assessment—and are fair game for the court to consider at sentencing.

*United States v. Shepherd*, 922 F.3d 753, 758 (6th Cir. 2019).

#### **IV. \$35,000 Special Assessment of the AVAA**

The United States seeks the imposition of a special assessment pursuant to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 (AVAA). Assessments paid under the AVAA are deposited into the Child Pornography Victims Reserve, which funds are available to victims in partial or full satisfaction of their restitution claims. 18 U.S.C. §§ 2259B(b), 2259(d). “It is the intent of Congress that victims of child pornography be compensated for the harms resulting from every perpetrator who contributes to their anguish. Such an aggregate causation standard reflects the nature of child pornography and the unique ways that it actually harms victims.” AVAA, PL 115-299, December 7, 2018, 132 Stat 4383.

Under the AVAA, the Court shall assess not more than \$35,000 on any person convicted of receipt of child pornography. PSR ¶ 79; 18 U.S.C. § 2259A(a)(1). This

1 assessment is “in addition to any other criminal penalty, restitution, or special  
2 assessment authorized by law.” § 2259A(a). Imposition of an AVAA assessment  
3 “does not relieve a defendant of, or entitle a defendant to reduce the amount of, any  
4 other penalty by the amount of the assessment.” 18 U.S.C. § 2259A(2).  
5

6  
7 In determining the amount of AVAA assessment to impose, the Court shall  
8 “consider the factors set forth in sections 3553(a) and 3572.” 18 U.S.C. § 2259A(c).  
9

10 These factors include, in addition to the 3553(a) factors discussed above:

- 11 (1) The defendant’s income, earning capacity, and  
12 financial resources;
- 13 (2) The burden that the fine will impose upon the  
14 defendant, any person who is financially dependent on  
15 the defendant, or any other person (including a  
16 government) that would be responsible for the welfare  
17 of any person financially depending on the defendant,  
18 relative to the burden that alternative punishments  
19 would impose;
- 20 (3) Any pecuniary loss inflicted upon others as a result of  
21 the offense;
- 22 (4) Whether restitution is ordered or made and the amount  
23 of such restitution;
- 24 (5) The need to deprive the defendant of illegally obtained  
25 gains from the offense;
- 26 (6) The expected costs to the government of any  
27 imprisonment, supervised, release, or probation  
28 component of the sentence; [and]
- (7) Whether the defendant can pass on to consumers or  
other persons the expense of the fine.

18 U.S.C. § 3572(a).

If Defendant was subject to a restitution order, that would be a § 3572 factor  
weighing against imposition of an AVAA assessment. 18 U.S.C. § 3572(a)(4).

1 Instead, however, the government is balancing its request of a \$5,000 AVAA  
2 assessment with imposition of the JVT A assessment. The government notes that  
3 \$5,000 is less than the statutory restitution to even two victims under the AVAA.  
4 See PSR ¶ 82; 18 U.S.C. § 2259.  
5

6 Defendant would be able to pay \$25 per quarter through the Inmate Financial  
7 Responsibility Program during his period of incarceration towards any assessment.  
8 Even if no IFRP earnings are contributed, Defendant could make payments while on  
9 supervised release, without unreasonably burdening Defendant. If the Court  
10 imposes both an AVAA assessment and a JVT A assessment, Defendant's payments  
11 would go first to the AVAA assessment. 18 U.S.C. § 2259A(d)(2).  
12  
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### 14 **CONCLUSION**

15 Application of 18 U.S.C. § 3553 supports a sentence of 78 months, followed  
16 by eight years of supervised release for Defendant's commission of the crime of  
17 attempted production of child pornography. The government submits that such a  
18 sentence is sufficient, but not greater than necessary, to accomplish the goals of  
19 sentencing, and that a lesser sentence is not supported by application of the 18 U.S.C.  
20 § 3553(a) factors.  
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23 ///

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1 Respectfully submitted: March 7, 2022.

2 Vanessa R. Waldref  
3 United States Attorney

4 s/ Ann T. Wick  
5 Ann T. Wick  
6 Assistant United States Attorney  
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10 **CERTIFICATE OF SERVICE**  
11

12 I hereby certify that on March 7, 2022, I electronically filed the foregoing  
13 with the Clerk of the Court using the CM/ECF system which will send notification  
14 of such filing to defense counsel of record.  
15

16 s/ Ann T. Wick  
17 Ann T. Wick  
18 Assistant United States Attorney  
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